

## **REMARKS**

### **I. Introduction**

With the cancellation herein without prejudice of claim 4, claims 1, 3 and 5 to 9 are pending in the present application. In view of the foregoing amendments and following remarks, it is respectfully submitted that all of the presently pending claims are allowable, and reconsideration is respectfully requested.

### **II. Objection to the Drawings**

The proposed drawing corrections filed on January 7, 2003 were not entered on the basis that the proposed drawing corrections allegedly introduce new matter, and the drawings were objected to under 37 C.F.R. § 1.83(a) as allegedly failing to show that "the lifting platform is configured to lift an entire motor vehicle." While Applicant respectfully disagrees that the proposed drawing corrections introduce new matter and while Applicant respectfully disagrees with the merits of this objection, to facilitate matter, claim 1 has been amended herein without prejudice to delete the phrase "wherein the lifting platform is configured to lift an entire motor vehicle," thereby rendering moot the present objection. The Specification has been amended herein to delete the reference character "30," which was added in the Amendment filed on January 7, 2003. In view of all of the foregoing, it is respectfully submitted that this objection has been obviated, and withdrawal of this objection is therefore respectfully requested.

### **III. Objection to the Disclosure Under 35 U.S.C. § 132**

The disclosure was objected to under 35 U.S.C. § 132 on the basis that the amendment filed on January 7, 2003 allegedly added new matter. The Final Office Action alleges that the original disclosure does not support the recitation that "the lifting platform is configured to lift an entire motor vehicle." While Applicant respectfully disagrees with the merits of this objection, to facilitate matters, claim 1 has been amended herein without prejudice to delete the phrase "wherein the lifting platform is configured to lift an entire motor vehicle," thereby rendering moot the present objection. Withdrawal of this objection is therefore respectfully requested.

#### **IV. Rejection of Claims 1 and 3 to 9 Under 35 U.S.C. § 103(a)**

Claims 1 and 3 to 9 were rejected under 35 U.S.C. § 103(a) as unpatentable over German Published Patent Application No. 31 52 422 ("Kilgus et al.") in view of European Published Patent Application No. 0 960 770 ("Baer"). Applicant respectfully submits that the combination of Kilgus et al. and Baer does not render obvious the present claims as amended herein for the following reasons.

Claim 1, as amended herein, relates to an operating device for a vehicle lifting platform. Claim 1 recites that the operating device includes a housing and that the housing includes a cover and a plurality of operating elements disposed in the cover and formed as a foot switch. Claim 1 as amended herein recites that the housing is fixed in a sunken manner in a floor separate and adjacent to the vehicle lifting platform and that the cover is disposed at a level of the floor. Support for the recitation that the housing is fixed in a sunken manner in the floor separate and adjacent to the vehicle lifting platform may be found, for example, on page 3, lines 5 to 16 of the Specification. Claim 1 has been amended herein without prejudice to include the limitations of claim 4, now canceled. That is, claim 1 has been amended herein without prejudice to recite that the operating elements include a first foot switch configured to lift the lifting platform, a second foot switch configured to lower the lifting platform and a safety foot switch, the first foot switch, the second foot switch and the safety foot switch being arranged inside of the cover, the safety foot switch being arranged at a distance to the first foot switch and the second foot switch, the safety foot switch being configured to activate the first foot switch and the second foot switch.

The Final Office Action alleges that Kilgus et al. "disclose[] an operating device comprising a plurality of housings . . . , configured to be arranged in a sunken manner in a floor 23, the housing including a cover 30, an operating elements [sic] disposed in the cover and formed as a foot switch, and the upper side of the cover is configured to be aligned with the level of the floor." Final Office Action at p. 3. Kilgus et al. are alleged to also disclose a separate housing for each operating element.

The Final Office Action alleges that Baer "discloses a foot operating device comprising a housing having a plurality of operating elements disposed in the cover and a display device for providing a display in accordance with predetermined operating states." Final Office Action at p. 3.

As an initial matter, claim 1 relates to an operating device for a vehicle lifting platform, i.e., a lifting platform arranged to lift a vehicle. In stark contrast, Baer and Kilgus et al. relate to lifting platforms attached to the rear of a vehicle. Thus, both Baer and Kilgus et al. are neither in the field of Applicant's endeavor nor reasonably pertinent to the particular problem with which Applicant was concerned. Accordingly, it is respectfully submitted that Baer and Kilgus et al. constitute nonanalogous art, and it is therefore respectfully requested that the present rejection be withdrawn.

That the vehicle lifting platform referred to in claim 1 is arranged to lift a vehicle, as opposed to a lifting platform attached to the rear of the vehicle, would be readily understood by a person having ordinary skill in the art, particularly based on a reading of the text of the present application. That is, a person having ordinary skill in the art would readily understand the meaning of the technical term "vehicle lifting platform." In this regard, the Specification of the present application mentions German Published Patent Application No. 32 35 829, which illustrates such a vehicle lifting platform and the English-language abstract of which makes reference to a "vehicle-lifting platform" of the type configured to lift vehicles, "particularly . . . private cars." Such vehicle lifting platforms are in stark contrast to the platforms attached to the rear of a vehicle as described by Baer and Kilgus et al.

Applicant respectfully submits that the combination of Kilgus et al. and Baer does not disclose, or even suggest, all of the limitations of claim 1 as amended herein. In particular, it is respectfully submitted that Kilgus et al. do not disclose, or even suggest, an operating device for a vehicle lifting platform in which a housing is fixed in a sunken manner in a floor separate from and adjacent to the vehicle lifting platform, in which a cover is disposed at a level of the floor, and in which the operating elements include a first foot switch configured to lift the lifting platform, a second foot switch configured to lower the lifting platform and a safety foot switch, the first foot switch, the second foot switch and the safety foot switch being arranged inside of the cover, the safety foot switch being arranged at a distance to the first foot switch and the second foot switch, the safety foot switch being configured to activate the first foot switch and the second foot switch. Kilgus et al. are limited to describing a cargo lift for installation on a rear of a truck. See Abstract and Figs. 1 and 2. Thus, Kilgus et al. fail to disclose, or even suggest, a housing fixed in a sunken manner in a floor as recited in claim 1. Furthermore, Kilgus et al. fail to

disclose, or even suggest, a housing configured to be arranged in a sunken manner in the floor separate from and adjacent to the vehicle lifting platform as recited in amended claim 1. Moreover, Kilgus et al. fail to disclose, or even suggest, operating elements including a first foot switch configured to lift the lifting platform, a second foot switch configured to lower the lifting platform and a safety foot switch, the first foot switch, the second foot switch and the safety foot switch being arranged inside of the cover, the safety foot switch being arranged at a distance to the first foot switch and the second foot switch, the safety foot switch being configured to activate the first foot switch and the second foot switch as recited in amended claim 1.

Baer does not correct the deficiencies of Kilgus et al. Baer merely describes allowing two foot switches (element 2) to be retrofitted on platforms which attach to truck lifts for aid in control. Thus, Baer fails to disclose, or even suggest, a housing fixed in a sunken manner in a floor as recited in claim 1. Furthermore, Baer fails to disclose, or even suggest, a housing configured to be arranged in a sunken manner in the floor separate from and adjacent to the vehicle lifting platform as recited in amended claim 1. Moreover, Baer fails to disclose, or even suggest, operating elements including a first foot switch configured to lift the lifting platform, a second foot switch configured to lower the lifting platform and a safety foot switch, the first foot switch, the second foot switch and the safety foot switch being arranged inside of the cover, the safety foot switch being arranged at a distance to the first foot switch and the second foot switch, the safety foot switch being configured to activate the first foot switch and the second foot switch as recited in amended claim 1.

In rejecting a claim under 35 U.S.C. § 103(a), the Examiner bears the initial burden of presenting a prima facie case of obviousness. In re Rijckaert, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish prima facie obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine reference teachings. In re Fine, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. In re Vaeck, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). Second, there must be a reasonable expectation of success. In re Merck & Co., Inc., 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim limitations. In re Royka, 490 F.2d

981, 180 U.S.P.Q. 580 (C.C.P.A. 1974). As indicated above, the combination of Kilgus et al. and Baer does not disclose, or even suggest, all of the limitations of amended claim 1, including a housing fixed in a sunken manner in a floor separate from and adjacent to the vehicle lifting platform, a cover of the housing disposed at a level of the floor or operating elements including a first foot switch configured to lift the lifting platform, a second foot switch configured to lower the lifting platform and a safety foot switch, the first foot switch, the second foot switch and the safety foot switch being arranged inside of the cover, the safety foot switch being arranged at a distance to the first foot switch and the second foot switch, the safety foot switch being configured to activate the first foot switch and the second foot switch as recited in amended claim 1. It is therefore respectfully submitted that the combination of Kilgus et al. and Baer does not render obvious amended claim 1.

Moreover, it is respectfully submitted that the cases of In re Fine, supra, and In re Jones, 21 U.S.P.Q.2d 1941 (Fed. Cir. 1992), make plain that the Office Action's generalized assertions that it would have been obvious to modify or combine the references do not properly support a § 103 rejection. It is respectfully submitted that those cases make plain that the Final Office Action reflects a subjective "obvious to try" standard, and therefore does not reflect the proper evidence to support an obviousness rejection based on the references relied upon. In particular, the Court in the case of In re Fine stated that:

The PTO has the burden under section 103 to establish a *prima facie* case of obviousness. It can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. This it has not done. . . .

**Instead, the Examiner relies on hindsight in reaching his obviousness determination. . . . One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.**

In re Fine, 5 U.S.P.Q.2d at 1598 to 1600 (citations omitted; italics in original; emphasis added). Likewise, the Court in the case of In re Jones stated that:

Before the PTO may combine the disclosures of two or more prior art references in order to establish *prima facie* obviousness, there must be some suggestion for doing so, found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. . . .

**Conspicuously missing from this record is any evidence, other than the PTO's speculation (if it be called evidence) that one of ordinary skill . . . would have been motivated to make the modifications . . . necessary to arrive at the claimed [invention].**

In re Jones, 21 U.S.P.Q.2d at 1943, 1944 (citations omitted; italics in original).

That is exactly the case here since it is believed and respectfully submitted that the present Final Office Action offers no evidence whatsoever, but only conclusory hindsight, reconstruction and speculation, which these cases have indicated does not constitute evidence that will support a proper obviousness finding. Unsupported assertions are not evidence as to why a person having ordinary skill in the art would be motivated to modify or combine references to provide the claimed subject matter of the claims to address the problems met thereby. Accordingly, the Office must provide proper evidence of a motivation for modifying or combining the references to provide the claimed subject matter.

More recently, the Federal Circuit in the case of In re Kotzab has made plain that even if a claim concerns a "technologically simple concept" -- which is not the case here -- there still must be some finding as to the "specific understanding or principle within the knowledge of a skilled artisan" that would motivate a person having no knowledge of the claimed subject matter to "make the combination in the manner claimed," stating that:

In this case, the Examiner and the Board fell into the hindsight trap. The idea of a single sensor controlling multiple valves, as opposed to multiple sensors controlling multiple valves, is a technologically simple concept. With this simple concept in mind, the Patent and Trademark Office found prior art statements that in the abstract appeared to suggest the claimed limitation. But, there was no finding as to the specific understanding or principle within the knowledge of a skilled artisan that would have motivated one with no knowledge of Kotzab's invention to make the combination in the manner claimed. In light of our holding of the absence of a motivation to combine the teachings in Evans, we conclude that the Board did not make out a proper prima facie case of obviousness in rejecting [the] claims . . . under 35 U.S.C. Section 103(a) over Evans.

In re Kotzab, 55 U.S.P.Q.2d 1313, 1318 (Fed. Cir. 2000) (emphasis added). Again, it is believed that there have been no such findings.

Accordingly, there is no evidence that the references relied upon, whether taken alone, combined or modified, would provide the features and benefits of amended claim 1. It is therefore respectfully submitted that claim 1 is allowable for these reasons.

Claims 3 and 5 to 9 ultimately depend from claim 1 and therefore include all of the limitations of claim 1. Applicant respectfully submits that claims 3 and 5 to 9 are patentable for at least the same reasons given above in support of the patentability of claim 1. In re Fine, supra (any dependent claim that depends from a non-obvious independent claim is non-obvious).

Claim 4 has been canceled herein without prejudice, thereby rendering moot the present rejection with respect to claim 4.

**V. Conclusion**

It is therefore respectfully submitted that all pending claims are allowable. All issues raised by the Examiner having been addressed, an early and favorable action on the merits is earnestly solicited.

Respectfully submitted,

KENYON & KENYON

Dated: \_\_\_\_\_

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By: \_\_\_\_\_

Richard L. Mayer  
Reg. No. 22,490

One Broadway  
New York, New York 10004  
(212) 425-7200

**CUSTOMER NO. 26646**

cliff olrich  
908 6079